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11 **ATTORNEYS FOR PLAINTIFF**

12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA**

14 **OAKLAND DIVISION**

16 SKYE ASTIANA on behalf of herself and all  
17 others similarly situated,

18 Plaintiff,

19 v.

20 BEN & JERRY'S HOMEMADE, INC.,

21 Defendant.

CASE NO.: 10-cv-04387-PJH

CLASS ACTION

**PLAINTIFF'S REPLY MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR CLASS  
CERTIFICATION**

Date: November 20, 2013

Time: 9:00 a.m.

Ctrm: 3, 3rd Floor

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1     **I. INTRODUCTION**

2       In opposing class certification (“Opp.”) (Dkt. #122-3) in this case involving the ice cream flavoring  
 3 ingredient alkalized cocoa, Defendant Ben & Jerry’s Homemade, Inc. (“B&J”) sidelines the controlling  
 4 federal provisions that establish a clear standard with regard to flavoring ingredients in ice cream. *See* 21  
 5 U.S.C. §343(k) (requiring disclosure of artificial flavors on labels); 21 C.F.R. §135.110(f)(2)  
 6 (implementing §343(k) for labeling of ice cream); *see also* §101.22(a) (implementing §343(k) defining  
 7 artificial and natural flavors); §101.22(i) (implementing §343(k) defining characterizing flavors of foods).  
 8 In tandem with downplaying the applicable regulations, B&J ignores *Astiana v. Dreyer’s Grand Ice*  
 9 *Cream, Inc.*, 2012 WL 2990766, at \*4-11 (N.D.Cal. July 20, 2012), another “all natural” ice cream labeling  
 10 action, wherein Judge Chen construed these federal provisions to undermine the position B&J posits in  
 11 opposing class certification here. In *Dreyer’s*, as here, the pertinent packaging failed to disclose that one of  
 12 the ingredients, alkalized cocoa, was processed using a synthetic and/or artificial alkalizing agent, *i.e.*,  
 13 potassium carbonate, as opposed to a nonsynthetic one. Judge Chen rejected the defendant ice cream  
 14 maker’s argument that because potassium carbonate is commonly used as an alkalizing agent, nothing  
 15 artificial or synthetic had been used in its ice cream. *Id.* at \*11. Judge Chen further held that if an ice  
 16 cream product contains *any* artificial flavor that simulates, resembles, or reinforces the characterizing  
 17 flavor, the product **must** be labeled “artificially flavored.” *Id.* at \*6.

18       Here, B&J violated Sections 135.110(f)(2) by failing to label its ice cream that contained  
 19 artificially-flavored chocolate “artificially flavored,” and instead misleadingly labeled the products,  
 20 including all of the products’ flavor ingredients, as being “All Natural.” Rather than grapple with the on-  
 21 point ice cream authority in *Dreyer’s*, B&J seizes on a single inapposite conclusion in *Astiana v. Kashi*  
 22 Co., 291 F.R.D. 493 (S.D.Cal. July 30, 2013), which did not involve ice cream or the federal flavoring  
 23 regulations applicable to ice cream. At the same time, B&J ignores the broader rulings in *Kashi* which do  
 24 apply here with full force. Beyond its selective reliance on *Kashi*, B&J employs a scattershot approach in  
 25 opposing class certification that fails on every front. The Court should certify the proposed Class.

26     **II. THE PROPOSED CLASS IS ASCERTAINABLE**

27       **A. Lack of Ascertainability Does Not Preclude Class Certification**

28       As shown below, the proposed class here is readily ascertainable. But even if it were not,

certification should not be denied on this ground. B&J argues that the proposed class is not ascertainable but ignores that in a key case it proffers for this point, *Red v. Kraft Foods, Inc.*, 2012 WL 8019257, \*6 (C.D.Cal. April 12, 2012), (Opp. at 4), the court emphasized that “[a] lack of ascertainability alone will generally not scuttle class certification.” *See also Galvan v. KDI Distrib.*, 2011 WL 5116585, at \*5 (C.D.Cal. Oct. 25, 2011) (“[T]he class definition may include individuals who...have inadequate proof to go forward with the class. However, these ascertainability issues are not fatal to class certification and may be addressed later in the litigation.”); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 253298, at \*3 (N.D.Cal. Jan. 26, 2012) (citing several cases for the proposition that “[n]umerous courts have held that a class can be certified even if its membership is unclear or overbroad”).

#### **B. B&J’s Failure to Maintain Records of Consumer Purchases Does Not Render the Class Unascertainable**

B&J’s theory that no class may be ascertained because it does not maintain records of consumer purchases (Opp. at 4) has been denied by many courts, including *Kashi* on which B&J principally relies:

Defendant’s concern that the Court will have difficulty identifying members of the class is unavailing. Because Defendant does not have records of consumer purchases, and potential class members will likely lack proof of their purchases, Defendant argues that the Court will have no feasible mechanism for identifying class members and will have to pursue proof individual to each class member. However, “[t]here is no requirement that ‘the identity of the class members...be known at the time of certification.’” If class actions could be defeated because membership was difficult to ascertain at the class certification stage, “there would be no such thing as a consumer class action.” As long as the class definition is sufficiently definite to identify putative class members, “[t]he challenges entailed in the administration of this class are not so burdensome as to defeat certification.”

291 F.R.D. at 500 (quoting and relying on *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 536 (N.D.Cal. 2012), and *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D.Cal. 2011)); *see also Chavez v. Blue Skye Natural Bev. Co., Inc.*, 268 F.R.D. 365, 376-77 (N.D.Cal. 2010) (beverage mislabeling class sufficiently identifiable); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 594 (C.D.Cal. 2008) (class ascertainable where definition listed objective characteristics and consumers could “determine whether they are class members”).

#### **C. B&J’s “Scavenger Hunt” Theory Also Fails**

B&J’s other ascertainability theory, while more novel, is equally unavailing. B&J claims that the proposed class is not ascertainable because establishing that the subject B&J Ice Cream Products included

1 cocoa alkalized with a synthetic or artificial ingredient is akin to a “scavenger hunt.” B&J Opp. at 4.  
 2 According to B&J, no class may be certified unless and until Plaintiff establishes beyond doubt the  
 3 particular alkalizing agent in every class member’s Ice Cream purchase. *See id.* This is not Plaintiff’s  
 4 burden. See *In re TFT-LCD*, 2012 WL 253298, at \*2 (certifying class and quoting *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566–67 (1981) for the proposition: “[I]t does not come with  
 5 very good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has itself  
 6 inflicted”); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 808 (7th Cir. 2012) (“In  
 7 essence, it is important not to let a quest for perfect evidence become the enemy of good evidence”)  
 8 (quoted in *In re TFT-LCD*, 2012 WL 253298, at \*2).  
 9

10 In any event, Barry Callebaut, the supplier of alkalized cocoa used in B&J’s ice cream, confirmed  
 11 that its alkalized cocoa was not made with all natural ingredients and was not a natural flavor. Dkt. #116-  
 12 10 (Barry Callebaut through Ben DeShryver (“DeShryver Dep.”)) at 88:17-90:10. This is true **regardless**  
 13 **of which alkalizing agent is used.** *Id.* at 56:7-13. Likewise, Plaintiff’s rebuttal expert confirms neither  
 14 alkalized cocoa nor the alkalizing agent used here are natural. Kravec Dec. Ex. 3, Rebuttal Dec. of Kurt  
 15 Hong, M.D. Ph.D., ¶¶ 21, 23, 27. This compelling evidence eviscerates B&J’s ascertainability theory.  
 16

17 B&J seeks to squash a third piece of supporting evidence based on B&J’s internal documents and  
 18 referenced in Plaintiff’s prior briefing, claiming that it produced the documents “inadvertently.” *See* Dkt.  
 19 #128-3. Although no ruling on B&J’s motion seeking to recall these documents has been made, B&J’s  
 20 counsel nonetheless has threatened sanctions if Plaintiff discusses those documents here. Kravec Dec., Ex.  
 21 5. By now, the Court is no doubt well aware of the content of these documents and their import so we need  
 22 not discuss them further here. But even if these internal documents are disregarded, the proposed class is  
 23 still readily ascertained, and B&J’s contrary argument is pure obfuscation.

24 B&J states that while it utilizes 60 different cocoa-based ingredients, 13 of these do not use alkali.  
 25 B&J Opp. at 3-4. Yet, B&J admits that Food and Drug Administration (“FDA”) rules require that any food  
 26 product containing alkalized cocoa must so state on its label. Declaration of Paul Szalkucki (“Szalkucki  
 27 Decl.”) (Dkt. #124-00) ¶ 12. This case involves **only** Ice Cream Products whose labels identify alkalized  
 28 cocoa as an ingredient. *See* Ice Cream Product labels (Dkt. ##116-1, 116-2). B&J seeks to confuse the  
 Court with the immaterial point that “[i]f a consumer bought Ice Cream that used exclusively one of those

1 13 non-alkalized cocoa ingredients, he or she is not a class member.” Opp. at 4. However, the proposed  
 2 class includes **only** those consumers who purchased Ice Cream Products that included alkalized cocoa as an  
 3 ingredient. Indeed, B&J has so stipulated. *See Stipulation for Class Certification (“Stipulation”)* (Dkt.  
 4 #116-8) ¶ 9 (“Each of the PRODUCTS included in the proposed class contained some form of alkalized  
 5 cocoa listed amongst the PRODUCTS’ ingredients as ‘cocoa (processed with alkali)’”).

6 B&J next seeks to take advantage of the fact that while Unilever’s cocoa suppliers are required to  
 7 adhere to Unilever’s specifications for any ingredient that goes into B&J’s Ice Cream Products, but B&J  
 8 never specified what alkalizing agent was to be used in making the alkalized cocoa included in the B&J  
 9 Products. *See Fed.R.Civ.P. 30(b)(6) Deposition of Ben & Jerry’s (through Michael Graning) (“B&J Dep.”)*  
 10 (Dkt. #116-7) at 20:25 to 21:9-18; DeShryver Dep. at 99:3-10. B&J likewise seeks traction from its failure  
 11 to track what alkalizing agent was in fact utilized. Szalkucki Decl. ¶ 9. Based on these points, B&J claims  
 12 that Plaintiff cannot establish that its Ice Cream Products used a synthetic or artificial alkalizing agent.  
 13 Opp. at 4. Yet B&J **admitted** that “...Barry Callebaut was the only supplier who supplied B&J with  
 14 alkalized cocoa powder for use in PRODUCTS where the cocoa powder formed the chocolate base of the  
 15 ice cream.” Stipulation ¶ 12. Nor has B&J disputed Plaintiff’s evidence that the B&J Ice Cream Products  
 16 for which Barry Callebaut supplied alkalized cocoa was processed with potassium carbonate primarily as  
 17 well as a combination of sodium hydroxide and ammonium bicarbonate which are all synthetic substances.  
 18 *See Plaintiff’s Opening Brief at 5 (citing DeShryver Dep. at 20:16-22 and 7 C.F.R. § 205.605(b), which list*  
 19 *potassium carbonate, sodium hydroxide and ammonium bicarbonate as synthetic ingredients).*

### 20 III. PLAINTIFF HAS ESTABLISHED NUMEROSITY

21 B&J’s numerosity argument is a simple rehash of its ascertainability argument. *See* Opp. at 5. It  
 22 fails for the reasons set forth in the preceding section.

### 23 IV. PLAINTIFF HAS STANDING AND INJURY-IN-FACT

#### 24 A. Plaintiff Has Proffered Sufficient Evidence that She Paid a Price Premium and 25 Suffered an Economic Injury

26 B&J next argues that Plaintiff lacks standing and injury-in-fact. By means of selectively quoting  
 27 from Plaintiff’s deposition testimony (wherein she was badgered by counsel), and ignoring her on-point  
 28 statements, B&J seeks to give the impression that Plaintiff has no evidence that she paid a premium for the

1 B&J Ice Cream Products that she purchased because they were labeled "All Natural." See Opp. at 6-7.  
 2 Plaintiff's pertinent deposition testimony includes the following:

3 Q ....Paragraph 5 also says, "Ms. Astiana is willing to and has paid a premium for foods that are all  
 4 natural and has refrained from buying their counterparts that were not all natural." Do you see that?  
 A Yes.

5 Q That's also a true statement?  
 A Yes.

6 Deposition Testimony of Skye Astiana ("Astiana Dep.") (submitted herewith as Exhibit 1 to the  
 7 accompany Declaration of Joseph N. Kravec, Jr.) at 86:20 to 87:2. Plaintiff further testified:  
 8

9 Q ....Starting at line 10, it says, "Ms. Astiana," at line 11, "paid more for the B&J ice cream she  
 10 purchased than she would have had to pay for other similar ice cream or frozen yogurt products that  
 were 6 not all natural in that they contained man-made synthetic ingredients." Do you see that?  
 A Yes.

11 Q And that's a true statement?  
 A Yes.

12 *Id.* at 88:2-11.

13 Moreover, Plaintiff averred as follows in an interrogatory response:

14 Plaintiff lost money because she paid more to buy Defendant's "All Natural" ice cream and frozen  
 15 yogurt than she would have paid for similar ice cream or frozen yogurt that was not touted as "All  
 16 Natural." The premium Plaintiff paid for Defendant's "All Natural" products is the difference in  
 17 price between Defendant's products and similar products not touted as "All Natural." Although  
 18 individual retailers or average retail price data from companies like Neilson are likely a more  
 19 accurate source for pricing information, Plaintiff sets forth her best estimate of how much more  
 expensive Defendant's ice cream and frozen yogurt she purchased are than similar other non-natural  
 products, based on her past shopping experiences. Based on her past shopping experiences, Plaintiff  
 is generally aware of other brands, including private label and store brands, that she estimates are  
 about .50 to .75 cents cheaper than the Ben and Jerry's ice cream and frozen yogurt she bought.

20 Dkt. # 123-2 (Plaintiff's Answers to Defendant's First Set of Interrogatories at No. 1).

21 In its ruling denying B&J's motion to dismiss, the Court rejected B&J's standing/injury-in-fact  
 22 theory as follows: "If the plaintiffs did indeed purchase the ice cream based on the representation that it  
 23 was "all natural" and if that representation proves to be false, then they arguably have suffered an injury in  
 24 fact." *Astiana v. Ben & Jerry's Homemade, Inc.*, 2011 WL 2111796, at \*5 (N.D.Cal. May 26, 2011). The  
 25 quoted deposition testimony and interrogatory response adequately demonstrate that Plaintiff purchased  
 26 B&J Ice Cream Products based on the representation that they were "all natural" and that she paid a  
 27 premium because of that representation. Plaintiff suffered injury-in-fact and has standing.

28 Courts have routinely found similar allegations that plaintiffs did not receive what was advertised

1 and paid for sufficient to establish injury-in-fact for purposes of Article III and economic injury for  
 2 purposes of the UCL. *See, e.g., Chavez v. Blue Sky Natural Beverage Co.*, 340 F. App'x 359, 362 (9th Cir.  
 3 2009) (plaintiff adequately alleged injury-in-fact based on purchases of mislabeled sodas); *Peviani v.*  
 4 *Natural Balance, Inc.*, 22011 WL 754958, \*3 (S.D. Cal. Feb. 24, 2011) (plaintiff alleged economic injury  
 5 because she paid more for the product than she would have absent the deceptive statements on its labels);  
 6 *Johnson v. General Mills, Inc. et al.*, 2011 WL 1514702, \*1 (C.D.Cal. Apr. 20, 2011) (plaintiff suffered  
 7 economic injury where he “purchased YoPlus but did not receive the promised digestive health benefit”);  
 8 *Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 889 (Cal. 2011) (plaintiff adequately alleged injury based upon  
 9 purchase of “Made in U.S.A.” locksets).

10 *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), is instructive. The Ninth Circuit  
 11 there ruled that each class member was injured because he or she was relieved of money in a challenged  
 12 transaction and that loss was fairly traceable to defendants’ actions. *Id.* at 1021 (finding class standing  
 13 present where class members “came, saw, were conquered by stealth, and were relieved of their money”  
 14 through a fee based rewards program). The Ninth Circuit likewise ruled in *Mazza v. Am. Honda Motor*  
 15 *Co., Inc.*, 666 F.3d 581, 595 (9th Cir. 2012) (citing *Stearns*, 655 F.3d at 1021)<sup>1</sup>:

16 Plaintiffs contend that class members paid more for the CMBS than they otherwise would have paid,  
 17 or bought it when they otherwise would not have done so, because Honda made deceptive claims  
 18 and failed to disclose the system's limitations. To the extent that class members were relieved of  
 their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an “injury in  
 fact.”

19 *Kwikset*, decided under the UCL and the False Advertising Law, Cal. Bus. & Prof. Code § 17535 (“FAL”)  
 20 (the basis for Plaintiffs’ Seventh Cause of Action), also is on point. Plaintiffs there alleged that defendants  
 21 falsely labeled products as “Made in U.S.A.,” and that they relied on these labels and would not have  
 22 bought the products in their absence. The Court held that these allegations satisfied standing requirements,  
 23 because “labels matter,...consumers will choose one product over another similar product based on its  
 24 label and various tangible and intangible qualities they may come to associate with a particular source.”  
 25 *Id.* at 889. The Supreme Court explained that:

---

26 <sup>1</sup> The *Mazza* court vacated certification because, *inter alia*, the “small scale” of the challenged advertising  
 27 campaign did not support a presumption of reliance since many class members would not have been  
 28 exposed to it. *Id.*, 666 F.3d at 594, 596-97. The present case does not involve advertising of “limited  
 scope,” *id.* at 596, but labeling present on every product purchased by every class member.

From the original purchasing decision we know the consumer valued the product as labeled more than the money he or she parted with; from the complaint's allegations we know the consumer valued the money he or she parted with more than the product as it actually is; and from the combination we know that because of the misrepresentation the consumer (allegedly) was made to part with more money than he or she otherwise would have been willing to expend, i.e., that the consumer paid more than he or she actually valued the product. That increment, the extra money paid, is economic injury and affords the consumer standing to sue.

*Id.* at 890-91; *see also In re Google AdWords Litig.*, 2012 WL 28068, at \*10 (N.D.Cal. Jan. 5, 2012) ("The requirement of concrete injury is satisfied when the Plaintiffs and class members in UCL and FAL actions suffer an economic loss caused by the defendant, namely the purchase of defendant's product containing misrepresentations."); *see also Kashi*, 291 F.R.D. at 500-01 (rejecting the same standing and injury-in-fact arguments B&J asserts here).

#### B. Plaintiff has Standing as to All of the B&J's Ice Cream Products at Issue Here

The *Kashi* ruling relied on by B&J for one discrete point expressly rejected B&J's theory that Plaintiff here cannot sue as to the 27 Ice Cream Products labeled that she personally did not purchase. *See Opp.* at 7-8 ("As to those 27 other flavors, she might as well sue Ben & Jerry's over a puddle in which she didn't slip and fall"). The *Kashi* court explained:

Defendant's argument that Plaintiff Larsen can only represent purchasers of the exact same products, rather than similar products with the same alleged misrepresentations, is likewise unavailing. *See Anderson v. Jamba Juice Co.*, 888 F.Supp.2d 1000, 1006 (N.D.Cal. 2012) (holding purchaser of certain smoothie kits had standing as to purchasers of other kits because they contained same alleged misrepresentation).

291 F.R.D. at 502. Ignoring *Kashi* and *Jamba Juice* on this point, B&J instead relies on *Major v. Ocean Spray Cranberries, Inc.*, 2013 WL 2558125 (N.D.Cal. June 10, 2013). *Opp.* at 7-8. However, the plaintiff there failed to link any product that she purchased to the challenged improper labeling. *Id.* at \*4. She bought a blueberry drink product and relied on labeling claims pertaining to blueberries, yet sought to represent a class of purchasers of products that did not include blueberries or claims about blueberries. *Id.* Here, each product purchased by every class member was labeled "All Natural" yet contained cocoa alkalized with a synthetic or artificial chemical.

Unlike *Ocean Spray*, *Dreyer's* is on point. Denying the defendant ice cream maker's motion to dismiss in an "all natural" case that, unlike here, involved multiple synthetic ingredients, the court ruled that the plaintiff had standing as to ice cream flavors she did not purchase:

That the different ice creams may ultimately have different ingredients is not dispositive as Plaintiffs are challenging the same basic mislabeling practice across different product flavors. Indeed, many of the ingredients are the same—i.e., 21 out of 59 ice creams contain propylene glycol monostearate;

1           43 out of 59 contain potassium carbonate; and all 59 appear to contain glycerin, mono and  
 2           diglycerides, tetrasodium pyrophosphate and xanthan gum.... Therefore, the Court rejects [the  
 3           defendant's] argument that claims based on ice cream products not purchased by Plaintiffs should be  
 4           dismissed from the case.

5           2013 WL 5353043, at \*13; *see also Dorfman v. Nutramax Laboratories, Inc.*, 2013 WL 5353043, at \*7  
 6           (S.D.Cal. Sept. 23, 2013) (quoting *Dreyer's* with approval, and citing other cases to the same effect).

### 5           C. Plaintiff has Standing to Seek Injunctive Relief

6           Finally, B&J argues that Plaintiff lacks standing to seek injunctive relief because (1) she stated at  
 7           her deposition that she had not bought ice cream since 2010; and (2) B&J no longer uses "All Natural"  
 8           labeling. Opp. at 8-9. B&J relies on *Wright v. General Mills, Inc.*, 2009 WL 3247148, at \*5 (S.D.Cal.  
 9           Sept. 30, 2009), where the court dismissed the plaintiff's request for injunctive relief **with leave to amend**  
 10          because the defendant had already removed the offending ingredient from its product and the complaint did  
 11          not allege that the practice was likely to recur. Plaintiff here allege in the Amended Complaint:

12          Moreover, even once the "all natural" representation is removed from the labels, B&J is not  
 13          presently enjoined from putting the "all natural" representation back on its labels at any time it so  
 14          decides, even if its Ice Cream products still contain unnatural, synthetic ingredients. Accordingly,  
 15          Plaintiff seeks declaratory and injunctive relief to ensure B&J has in fact removed any and all of the  
 16          "all natural" representations from labels on its Ice Cream products still available for purchase, and to  
 17          prevent B&J from making the "all natural" representation on its Ice Cream labels in the future as  
 18          long as the Ice Cream products continue to use alkalized cocoa processed with a synthetic, unnatural  
 19          substance

20          Dkt. #20 ¶ 4. As for the fact that Plaintiff did not buy B&J Ice Cream between 2010 and her June 2013  
 21          deposition, this plainly does not establish that she will never again purchase such a product.

## 19          V. PLAINTIFF HAS SHOWN COMMONALITY AND PREDOMINANCE

### 20          A. The *Kashi* "Organic" Ruling is Inapposite Because the Federal Regulations that 21           Control Here and that B&J has Violated Did Not Apply in *Kashi*

22          B&J's commonality and predominance argument is largely premised on a single aspect of the *Kashi*  
 23          ruling that it otherwise scrupulously avoids. *Kashi* involved food products generally, not ice cream. The  
 24          court there made a novel ruling – no other court has ever so concluded – with respect to synthetic or  
 25          artificial ingredients that the FDA allows to be included in products certified as "organic." The *Kashi* court  
 26          concluded that the plaintiffs there failed to show that class members would view the presence of a synthetic  
 27          or artificial ingredient permitted in "organic" food to be inconsistent with an "all natural" representation.  
 28          291 F.R.D. at 508.

1        This case is different from *Kashi* because, unlike the labeling at issue there, B&J’s “all natural”  
 2 labeling indisputably violated controlling federal regulations that apply specifically to ice cream and to  
 3 flavoring agents such as cocoa. As Plaintiff established in her opening brief, FDA regulations mandate that  
 4 if the characterizing flavor or a simulating flavor **in ice cream** is artificial, the label must identify the ice  
 5 cream as either “artificially flavored” or “flavored” as specified in 21 C.F.R. § 135.110(f). The regulation  
 6 places an affirmative duty on the manufacturer to appropriately label the product if it contains any artificial  
 7 flavor, and does not permit the characterizing flavor of ice cream to be called “natural” or “all natural”  
 8 when it is not. *Id.* By failing to label its Ice Cream Products “artificially flavored” or “flavored” as  
 9 required by the federal regulations, and instead labeling those Products as “All Natural,” B&J violated a  
 10 federal regulation applicable to ice cream that was not at issue in *Kashi*.

11       Furthermore, under 21 C.F.R. § 101.22(i), which applies to characterizing flavors generally (not  
 12 just with regard to ice cream), if a food contains *any* artificial flavor that simulates, resembles, or reinforces  
 13 the characterizing flavor, the food must be labeled “artificially flavored.” *See Dreyer’s*, 2012 WL  
 14 2990766, at \*6 (citing FDA advisory opinion to this effect). As Plaintiff discussed at length in her opening  
 15 brief, and as B&J studiously ignores, Judge Chen in *Dreyer’s* carefully parsed these regulations and the  
 16 clear standard they embody with respect to ice cream labeled “all natural” that includes alkalized cocoa  
 17 processed with synthetic potassium carbonate. *See* Dkt #115 at 9-10 (analyzing *Dreyer’s*). The *Dreyer’s*  
 18 analysis applies here with full force: given the controlling federal regulations, a reasonable consumer  
 19 simply would not expect an ice cream maker that labels its product “all natural” to use an artificial or  
 20 synthetic alkalizing agent, particularly where an alkalizing agent that is not artificial or synthetic is  
 21 commonly available. *Dreyer’s*, 2012 WL 2990766, at \*11 (rejecting ice cream maker’s argument that  
 22 because potassium carbonate is commonly used as an alkalizing agent, a reasonable consumer would  
 23 expect it to be used in ice cream labeled “all natural”).

24       Because the ice cream and general flavor regulations did not apply in *Kashi*, that court’s “organic”  
 25 reasoning – even if it is presumed to be correct<sup>2</sup> – is inapplicable here. Furthermore, B&J ignores that the

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27       <sup>2</sup> Because the *Kashi* “organic” analysis is inapplicable here, Plaintiff will not dissect it in detail. However,  
 28 Plaintiff believes that the reasoning is subject to criticism. Judge Huff believed that because consumers  
       may equate “natural” with “organic,” the fact that the FDA permits particular synthetic and artificial  
       ingredients to be included in food products labeled “organic” means that a class member may not see the

1 *Kashi* court not only certified an entire “nothing artificial” class but also much of the “all natural” class as  
 2 well. *Id.* at \*15-16.

3 In a related point, B&J accuses Plaintiff of taking inconsistent positions about alkalized cocoa,  
 4 having first alleged that all alkalized cocoa is non-natural and later clarifying that only synthetic alkalis are  
 5 non-natural. Opp. at 10. In reality, Plaintiff clarified that B&J’s alkalized cocoa was not natural because it  
 6 used undisclosed synthetic alkalis. *See, e.g.,* Dkt. # 20, Amended Complaint at ¶ 2. This clarification is  
 7 not inconsistent. Moreover, the fact that the synthetic alkali was undisclosed is significant. As Judge Chen  
 8 pointed out in *Dreyer’s* in connection with knowledge about alkalizing agents, “a reasonable consumer  
 9 may not have the same knowledge as, *e.g.*, a commercial manufacturer.” 2012 WL 2990766, at \*11.

10 B&J also ambiguously claims that the FDA “disagrees that the term ‘natural’ is clear” (Opp. at 10),  
 11 but here the only ingredient at issue is an ice cream flavoring ingredient – alkalized cocoa. As Judge Chen  
 12 explained in *Dreyers*, FDA regulations provide a clear definition of “natural flavor” and “artificial flavor”  
 13 that controls the labeling of ice cream. *Dreyer’s*, 2012 WL 2990766, at \*4 (“Artificial flavor/flavoring and  
 14 natural flavor/flavoring are terms defined by regulation in 21 C.F.R. §101.22(a)(1) and (3).”).

15 B&J relegates its discussion of the controlling regulations to the end of its brief. Opp. at 20-22.  
 16 Completely ignoring Judge Chen’s careful, on-point analysis in *Dreyer’s* – the only case to have addressed  
 17 the issue – B&J falls back on a rehash of its other arguments. B&J also argues that the percentage of alkali  
 18 as part of the total product weight is small. Opp. at 21. Regardless of the percentage, the fact remains that  
 19 the “all natural” claim was false – a low percentage does not render the “All Natural” claim true. Nor does  
 20 the supposed chemical makeup of cocoa matter. *See* Opp. at 21. Federal regulations provide that the  
 21 alkalizing substance used in B&J Ice Cream Products – potassium carbonate – is a recognized synthetic  
 22 substance. 7 C.F.R. § 205.605(b). The fact remains that B&J felt compelled to remove the “All Natural”  
 23 claim from its Ice Cream Products. Its defense of that claim accordingly rings hollows.

24 B&J also complains that Plaintiff may not rely on the controlling regulations because this is an  
 25 “unpled claim” that Plaintiff did not allege in her December 8, 2010 Amended Complaint, Opp. at 22,

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27 presence of an ingredient allowed in “organic” foods to be inconsistent with an “all natural” claim. 291  
 28 F.R.D. at 508. This ignores the distinction between “organic” and “all natural,” and assumes that  
 consumers would accept synthetic ingredients in a product labeled “all natural.”

1 which was filed eighteen months before Judge Chen issued *Dreyer's* on July 12, 2012. Plaintiff's claims  
 2 are all brought under California law (Amended Complaint ¶¶ 34-70). The federal regulations provide legal  
 3 support for those state law claims. Moreover, following *Dreyer's*, Plaintiff put B&J on specific notice that  
 4 these federal regulations supported her claims in her answers to B&J's interrogatories. See Dkt #132-2 at  
 5 8, 10. While Plaintiff believes it would be a pointless exercise to amend to add this additional legal  
 6 support, she would be happy to do so if the Court would like. B&J certainly has suffered no prejudice as a  
 7 result of Plaintiff's reliance on the regulations.

#### 8       **B.     B&J's Litigation "Study" Does Not Advance Its Arguments**

9       In addition to relying on the inapposite aspect of *Kashi*, B&J also attempts to defeat commonality  
 10 by means of a survey of 400 consumers that it has just conducted which purportedly concludes that 13% of  
 11 those consumers would expect that a product labeled "all natural" containing alkalinized cocoa would expect  
 12 the alkali would be natural. See Opp. at 12. However, B&J's study is statistically and procedurally  
 13 incompetent and unreliable to draw any conclusion about consumers in Plaintiff's proposed class.<sup>3</sup> See  
 14 Kravec Dec, Ex. 2 (Rebuttal Report of Dr. Elizabeth Howlett ("Howlett Rebuttal") and Ex. 4 (Rebuttal  
 15 Report of Dr. Stephan Schneider ("Schneider Rebuttal").

16       As explained by Dr. Schneider, Dr. Van Liere's study is statistically unreliable because he only  
 17 sampled 116 total respondents from the relevant population, California, which is insufficient to draw any  
 18 conclusion about how California consumers view Ben & Jerry's "All Natural" labeling or whether they  
 19 expect that it contains alkalinized cocoa processed with a non-natural substance. Schneider Rebuttal, p. 4.

20       Even if Dr. Van Liere's study was statistically reliable, which it is not, it is also procedurally  
 21 unreliable. Dr. Van Liere failed to account for any potential bias in respondents who were familiar with  
 22 B&J's well-known and famous brand, and the plethora of news articles announcing that B&J was removing  
 23 the "All Natural" statement from its labels amid criticisms that its ingredients were not natural. Howlett  
 24 Rebuttal, ¶¶21-22, 26. Moreover, Dr. Van Liere does not control for bias in those actually responding to  
 25 the survey to ensure that a representative sample of the relevant population was surveyed. Schneider  
 26 Rebuttal at 5-6.

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27       <sup>3</sup> Drs. Schneider and Howlett provide numerous reasons why the Van Liere report and underlying study are  
 28 invalid and irreparably flawed, Plaintiff simply highlights a few of the critical reasons below.

1        Additionally, Dr. Van Liere had serious flaws in his selection and interpretation between the test  
 2 and control stimuli, rendering his conclusions unreliable. *Id.*, ¶¶ 20, 24, 34. Despite its flawed testing, Dr.  
 3 Van Liere's study still showed that the vast majority of participants believed that the B&J products  
 4 included cocoa processed with a natural alkali. *Id.*, ¶28.

5        **C.      Contrary to B&J's Claim, Reliance, Materiality, and Causation are Not  
                   "Inherently Individual"**

6        B&J also claims that commonality is defeated because "reliance, materiality, and causation are  
 7 inherently individual." Opp. at 12. However, relief under any of the UCL's three prongs is available  
 8 "without individualized proof of deception, reliance and injury," so long as the named plaintiffs  
 9 demonstrate injury and causation. *Kashi*, 291 F.R.D. at 504 (citing *Mass. Mut. Life Ins. Co. v. Super. Ct.*,  
 10 97 Cal.App.4th 1282, 1289, 119 Cal.Rptr.2d 190, 193 (Cal. Ct. App. 2002); *In re Tobacco II Cases*, 46  
 11 Cal.4th 298, 326–27 (Cal. 2009)). Likewise, under the CLRA, "[c]ausation, on a classwide basis, may be  
 12 established by materiality. If the trial court finds that material misrepresentations have been made to the  
 13 entire class, an inference of reliance arises as to the class." See *Stearns*, 655 F.3d at 1021 (quoted in *Kashi*,  
 14 291 F.R.D. at 501).

15        Here, unlike the ingredients excluded from the certified Class in *Kashi*, the federal statutory and  
 16 FDA regulatory provisions controlling the labeling of "natural" and "artificial" flavors on ice cream  
 17 expressly demonstrate materiality to consumers. First, Congress mandated that "[a] food is misbranded –  
 18 If it bears or contains any artificial flavoring, ... unless it bears labeling stating that fact..." *Dreyers*, 2012  
 19 WL 2990766, \* 4 (quoting 21 U.S.C. §343(k)). Second, §343(k)'s implementing regulation for ice cream  
 20 requires the front of the label to conspicuously identify the flavor as "artificial", "artificially flavored", or  
 21 "flavored." *Dreyers*, 2012 WL 2990766, \*5 (quoting 21 C.F.R. §135.110(f)(2)). Third, the FDA's  
 22 investigatory "Findings of Fact" that formed the basis of §135.110(f)(2) provide:  
 23

24        Consumers quite generally prefer natural over artificial flavorings and desire to know when  
 25 artificial flavorings are present in ice cream. To the extent that accurate information can be  
 26 conveyed to consumers by labeling on ice cream, label statements of the use of artificial  
 27 flavorings are in the consumer's interest. Label statements that comply with the requirements of  
 28 the general provisions of the Federal Food, Drug, and Cosmetic Act are 'artificially flavored,'  
 'artificial flavoring added,' 'with added artificial flavoring' ... (25 Fed. Reg. 7128, ¶19).

The purpose sought to be served by prescribing the flavoring ingredients was the prevention of misleading labeling. It is concluded that a preferable way to achieve this purpose, and one

which will promote honesty and fair dealing in the interest of consumers, is to provide, in designating artificial flavoring for label declaration... (*Id.*, at ¶20).

These regulatory findings of fact that form the basis of §135.110(f)(2) create a strong evidentiary presumption in Plaintiff's and the Class' favor that the mislabeling of artificial flavors as "All Natural" on ice cream is material to consumers. *See Morgan v. U.S.*, 298 U.S. 468, 477 (1936) ("When the Secretary acts within the authority conferred by the statute, his findings of fact are conclusive."); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935); *Rogge v. U.S.*, 128 F.2d 800, 803 (9th Cir. 1942).

In any event, Plaintiff presented ample common evidence from B&J, its parent Unilever and numerous independent marketing studies showing that consumers find "all natural" claims to be compelling, and a key driver of sales. *See* Dkt. #115 at 10:20-11:24. B&J does not directly address this substantial common evidence of materiality, but instead offers its own 2013 study done for this litigation and points to other studies which it contends shows a lack of materiality. Dkt. # 123-07 (Scott Report, pp. 17-27). As explained *supra*, B&J's 2013 study is seriously flawed and not credible. *See* §V.B, *supra*. But even if it were taken at face value as well as the other studies B&J points to, they amount to no more than some studies questioning materiality compared to the numerous studies Plaintiff submitted showing materiality. See Howlett Rebuttal, pp. 22-23. This hardly serves to extinguish Plaintiff's common evidence of materiality, but at most demonstrates competing common evidence and a predominant question of fact for the trier of fact to resolve.

## VI. DAMAGES ISSUES DO NOT PRECLUDE CERTIFICATION

B&J goes on at length in an effort to convince the Court that "entitlement to monetary relief raises inherently individual issues." Opp. at 16-19. The Ninth Circuit put this argument to rest in *Leyva v. Medline Industries Inc.*, 716 F.3d 510 (9th Cir. 2013), reiterating that "[i]n this circuit...damage calculations alone cannot defeat certification." *Id.* at 513-14. The court affirmed the long-standing principle that "[t]he amount of damages is invariably an individual question and does not defeat class action treatment." *Id.* at 513-14 (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)). Significantly, the Ninth Circuit so ruled after the Supreme Court issued its recent damages ruling in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (U.S. 2013).

In her opening submission, Plaintiff explained precisely how to calculate restitutionary

1 disgorgement of B&J's profits, to which class members would be entitled if they prevail. *See* Dkt. #115 at  
 2 21-23 and record material cited therein. B&J does not dispute that restitutionary disgorgement of profits  
 3 can be calculated on a class-wide basis here. B&J instead argues Plaintiff did not ask for restitutionary  
 4 disgorgement in her Amended Complaint. Opp. at fn. 8. However, this is untrue as it is clearly plead in  
 5 the "Prayer." Dkt. # 20, p. 19 (seeking "Restitution in such amount that Plaintiff and all Class and Sub-  
 6 Class members paid to purchase Ice Cream products, or the profits B&J obtained from those transactions").  
 7 Moreover, in certifying *Kashi*, Judge Huff approved very similar calculations, explaining that the plaintiff  
 8 claimed the same type of economic injury and damages as putative class members. As here, the plaintiff  
 9 there alleged point-of-purchase loss and sought restitution in the form of a refund of all or part of the  
 10 purchase price. 291 F.R.D. at 506. Judge Huff emphasized that "[a] court awarding restitution under the  
 11 California consumer protection laws has 'very broad' discretion to determine an appropriate remedy award  
 12 as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff the  
 13 amount that the defendant wrongfully acquired." *Id.* (citation omitted).

## 14 VII. PLAINTIFF IS TYPICAL

15 Plaintiff established typicality in her opening brief. B&J's paragraph on typicality is a rehash of its  
 16 other arguments, which are refuted above.

## 17 VIII. B&J HAS NOT REFUTED ADEQUACY

18 B&J makes just one objection as to adequacy, Plaintiff's settlement of the *Dreyer's* case discussed  
 19 above. Opp. at 23. *Dreyer's* is a separate and distinct action involving a private settlement with a unique  
 20 defendant, and the participation of the same named plaintiff and same counsel does not serve as a bar to  
 21 class certification here. In *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 105 F.R.D. 506, 509  
 22 (S.D. Ohio 1985), the defendants argued that the named plaintiffs could not show adequacy because the  
 23 plaintiffs previously had settled individual claims against one of the defendants. Rejecting this, the district  
 24 court emphasized, "The Court encourages parties to settle their disputes if possible; we will not find such a  
 25 settlement an impediment to certification of class claims against **other, independent defendants.**" *Id.*  
 26 (emphasis added). Moreover, although the named plaintiffs agreed not to disclose the terms of their  
 27 settlement, the court found that this did not undermine the adequacy of representation as the plaintiffs did  
 28

1 not conceal the fact that a settlement had been reached. *Id.*

2 Based on Ms. Astiana's previous filings describing the qualifications and experience of Class  
 3 Counsel, *see* Dkt. #115, at 16-17, the Court is well equipped to find that she and Class Counsel "will fairly  
 4 and adequately protect the interests of the class." *See* Fed.R.Civ.P. 23(a)(4).

## 5 **IX. B&J HAS NOT REFUTED SUPERIORITY**

6 B&J's superiority argument is particularly creative: because the Ice Cream Products stated  
 7 "satisfaction guaranteed or your money back," class action treatment is not superior. Opp. at 24-25. As  
 8 one court has pointed out, Fed.R.Civ.P. 23(b)(3) does not address superiority as a matter of abstract  
 9 economic choice analysis, but asks if a class action is "superior to other available methods for fairly and  
 10 efficiently adjudicating the controversy"— *i.e.*, other possible adjudication methods such as individual  
 11 lawsuits or a consolidated lawsuit. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, --- F.R.D.  
 12 ----, 2013 WL 1182733, at \*11 (D.Me. Mar. 20, 2013) ("Hannaford may or may not have a good program  
 13 to satisfy aggrieved customers, but that the Hannaford program is not relevant to my superiority  
 14 determination under the class certification decision."). Indeed, all four enumerated factors in this portion  
 15 of the Rule deal with adjudication. *See also* the language of the Advisory Committee note in the 1966  
 16 amendment that added this provision. The Seventh Circuit recognized this language in holding that a  
 17 refund program cannot be considered a method of "adjudicating the controversy" under Fed.R.Civ.P.  
 18 23(b)(3). *In re Aqua Dots Prods. Liability Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

## 19 **X. CONCLUSION**

20 For the reasons discussed herein and in Plaintiff's opening submission, Plaintiff respectfully  
 21 requests the Court certify this case as a class action, appoint her as Class Representative, and appoint Class  
 22 Counsel (*i.e.*, Joseph N. Kravec, Jr. of Feinstein Doyle Payne & Kravec, LLC, Michael D. Braun of the  
 23 Braun Law Group, P.C., and Janet Lindner Spielberg of the Law Offices of Janet Lindner Spielberg).

24  
 25 DATED: October 30, 2013

**FEINSTEIN DOYLE PAYNE  
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 28

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## **PROOF OF SERVICE**

STATE OF PENNSYLVANIA )  
COUNTY OF ALLEGHENY ) ss.: )

I am employed in the County of Allegheny, State of Pennsylvania. I am over the age of 18 and not a party to the within action. My business address is 429 Forbes Avenue, Allegheny Building, 17th Floor, Pittsburgh, PA 15219.

On October 30, 2013, using the Northern District of California's Electronic Case Filing System, with the ECF ID registered to Joseph N. Kravec, Jr., I filed and served the document(s) described as:

**PLAINTIFF'S REPLY MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

**[X] BY ELECTRONIC TRANSMISSION USING THE COURT'S ECF SYSTEM:** I caused the above document(s) to be transmitted by electronic mail to those ECF registered parties listed on the Notice of Electronic Filing (NEF) pursuant to Fed.R.Civ.P. 5(d)(1) and by first class mail to those non-ECF registered parties listed on the Notice of Electronic Filing (NEF). *"A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P. 5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."*

I declare that I am admitted *pro hac vice* in this action.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on October 30, 2013, at Pittsburgh, Pennsylvania.

s/Joseph N. Kravec, Jr.  
Joseph N. Kravec, Jr.